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No. 10-669

Supreme Court, U.S.
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In The
Supreme Court of the United States

WYETH PHARMACEUTICALS, INC.,

Petitioner,

v.

HOWARD HENRY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this matter is so factually distinct from the relevant portions of *Staub v. Proctor Hospital*, 09-400, that this Court's decision in *Staub* would provide no reason to disturb the judgment below.

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STATEMENT OF CASE

Respondent refers to the Second Circuit's description of the relevant facts. App. 3a-12a.[1] That description refers to the following:

> On January 16, 2004, Respondent complained of discrimination to the head of Petitioner's diversity program, App. 8a, based upon a series of promotional denials and other acts that Respondent believed were discriminatory and which occurred between approximately December 2001 and year-end 2003, App. 3a-8a.
>
> On January 22, 2004, Respondent again referred to discrimination when he spoke to Michael McDermott, the managing director of Petitioner's facility and the supervisor of one of the individuals Respondent believed was discriminating against him. App. 8a.
>
> Thereafter, Respondent met with the head of Petitioner's facility, Joe Bigelow, and again complained of racial discrimination, which sparked an investigation by Eugene Sacket into Respondent's claims.
>
> Respondent testified how his work environment changed after he made his complaints of discrimination, such as that his new supervisor, Andrew Espejo, sought timelines from Respondent for everything, assigned

[1] "App." refers to the Appendix to the Petition for Writ of Certiorari.

him additional responsibilities, wrote him up for absences that had been cleared in advance, and started to develop a paper trail that Respondent believed was part of a campaign to manufacture pretenses for future adverse employment actions. App. 10a.

In May 2004, Joe Vitanza, Andrew Espejo's supervisor, and thus Respondent's second-level supervisor, instructed Espejo to maintain careful records with respect to a "development plan" for Respondent, and to review those records with Joanne Rose of Petitioner's Human Resources Department. App. 10a.

Two weeks later, Respondent retained an attorney who sent a letter to Petitioner formally stating Respondent's claims of discrimination. App. 10a.

On June 28, 2004, Espejo forwarded Respondent's mid-year review to Rose for her review because, as Rose testified, there was "a higher level of concern" surrounding Respondent's employment as a result of his complaints of discrimination and the investigation thereof. App. 10a-11a.

On September 24, 2004, Respondent filed a formal charge of discrimination with the New York State Division of Human Rights and the U.S. Equal Employment Opportunity Commission (EEOC). App. 11a.

Rose testified that she became aware of the charge at some point during the investigation, but did not specify when. App. 11a.

On October 1, 2004, Respondent was interviewed for a promotional position that was denied to him and instead given to another white employee, who, based upon the evidence Respondent presented, could have been less qualified than Respondent. App. 11a. Respondent testified that he believed the position was decided upon by panel interview, rather than appointment as in the past, because he was one of the applicants. App. 11a.

Respondent received a year-end performance review in 2004 that he believed to be further discrimination because it did not provide an accurate portrayal of his work over the course of the year. App. 12a.

In the same week that the EEOC issued Respondent's Dismissal and Notice of Rights to sue to both Petitioner and Respondent, Katz and Espejo informed Respondent that he was being placed on a "Performance Improvement Plan" (PIP), allegedly designed to help Respondent bring his performance up to standards. App. 12a. Katz testified that Rose assisted in the initial planning stages of the PIP, but that Stacy Marroso became the HR representative responsible for the PIP. App. 12a.

Katz and Espejo both testified that at the time they issued the PIP, they were unaware

> of Respondent's complaints of discrimination. App. 12a.

Because the resolution of Petitioner's question may require reliance upon certain evidence presented at trial that the Second Circuit did not refer to in its decision, Respondent refers to the following evidence adduced during the trial of this matter, which was contained in the parties' Joint Appendix in the Second Circuit:

> Referring to Espejo's documentation of Respondent's performance, although Espejo testified that he was instructed that all of his employees' development plans should be clearly documented and reviewed by Rose, he could not recall actually documenting anyone else or receiving an email to that effect relating to another employee like he did with respect to Respondent. JA at 332-33.[2]

> Referring to Respondent's 2004 year-end performance review conducted by Espejo, Respondent believed it was further evidence of discrimination and retaliation because it did not include a highly visible project that Respondent had been assigned to lead, which he completed successfully when no other engineer could do so prior to him. JA at 552, 111-12.

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[2] "JA" refers to the Joint Appendix filed in the Second Circuit.

Referring to the PIP, Respondent believed it was further evidence of retaliation because he had evidence that the allegations contained therein were false or unjustified, as they were department-wide problems being attributed solely to him, problems that had already been solved prior to the issuance of the PIP, or problems caused by others that he was being blamed for. JA at 118-23, 390-91.

As just one example, Respondent was being accused of turning in "Weekly Zone Checklists" late. JA at 119, 562. However, Respondent produced evidence that the cause of that issue was others turning in the checklists late to him, JA at 119, 388-89, including Espejo himself who failed to turn in a December 6, 2003, checklist until March 4, 2004, JA at 388-89, 547.

As another example, Respondent was accused of having "an unacceptable level of attendance . . . You have quadruple the number of absences (not including vacation days taken) than any other employee in the department[.]" JA at 562. This statement was completely false, as Respondent produced a chart prepared by Petitioner that showed he had taken a similar amount of sick days as everyone else in the department. JA at 380-81, 619-20.

Regarding all of the false allegations in the PIP, even Espejo testified that he had no independent knowledge whether Respondent

was or was not doing the tasks identified in the PIP before it was issued, JA at 344-45, yet Katz testified that it was Espejo's decision to place Respondent on the PIP, JA at 367. At Espejo's direction, Katz then began the process of compiling documentation to be used against Respondent as part of the PIP. JA at 368.

After Respondent completed the PIP, Espejo and Katz immediately resumed putting an enormous amount of work on him, including the work of other individuals, and Respondent testified that he felt the stress was too overwhelming. JA at 125. Respondent went to see his doctor and, upon his doctor's advice, took a medical leave of absence effective August 6, 2005. JA at 125. Respondent never returned from the medical leave of absence due to his emotional state, and Petitioner terminated his employment effective February 6, 2006. JA at 125.

REASONS FOR DENYING THE WRIT

Petitioner advances nothing more than a logically flawed argument in support of its requested writ and order to remand to the court below. It argues that this Court's decision in *Staub* will present a controlling development in the law that the Second Circuit did not consider, and that there is a likelihood that this Court's decision in *Staub* will require a different ultimate outcome in this case. Petition at 9.

However, the requested writ should be denied because of three material differences between the facts of this case and the facts of *Staub*. Accordingly, despite the ultimate decision this Court makes in *Staub*, it would have no bearing on the decision made by the Second Circuit in this case.

The first distinction to be made between this case and *Staub* is found in the respective roles of the individuals involved in the discrimination at issue. The second distinction relates to the fact that the purportedly non-discriminatory individuals in this case did not conduct the same kind of independent analysis of Respondent's performance as the non-discriminatory decision-maker made in *Staub*. Finally, there is a distinction in this case between the *discrimination* case presented in *Staub* and the *retaliation* case presented here.

In *Staub*, the discriminatory individual was a subordinate employee of the ultimate non-discriminatory decision-maker, and it is in such circumstances that the Seventh Circuit endorses its so-called "cat's paw theory" of liability. *See Staub v. Proctor Hosp.*, 560 F.3d 647, 655-57 (7th Cir. 2009) (citing *Brewer v. Board of Trustees of Univ. of IL*, 479 F.3d 908 (7th Cir. 2007)).

So, too, in a concurring opinion in *Ricci v. DeStefano*, 129 S.Ct. 2658, 2688 (2009), did Justice Alito refer to an unresolved question relating to "the circumstances in which an employer may be held liable based on the discriminatory intent of *subordinate*

employees who influence but do not make the ultimate employment decision." *Id.* (emphasis added). It is presumably this question, as that is the question presented by *Staub*, that this Court will ultimately consider.

However, that is not the question in this case. In this case, the discriminatory individuals, namely Rose and Vitanza, directed the actions of Espejo and Katz as subordinate employees under the circumstances. As the Second Circuit found, Rose was the individual who was aware of Respondent's complaints of discrimination; Vitanza, Espejo's boss, instructed Espejo to review his documentation regarding Respondent with Rose; Rose requested and reviewed Respondent's 2004 mid-year review from Espejo because there was a "higher level of concern" as a result of Respondent's complaints; and Rose was initially involved in setting up Respondent's PIP. App. 25a-26a. Espejo even admitted that he had no independent knowledge of whether Respondent was performing the tasks identified in the PIP as areas for improvement prior to the PIP being instituted, JA at 344-45, yet Katz testified that it was Espejo who directed Katz to place Respondent on the PIP, JA at 367.

In other words, neither Espejo or Katz knew of any reason to place Respondent on the PIP absent the direction of Rose and Vitanza that Respondent's performance needed to be documented, as Rose testified, due to the "higher level of concern" regarding Respondent's performance. And, as stated above, Respondent produced evidence at trial that the allegations

contained in the PIP were either wholly false or not attributable to him.

In support of Petitioner's argument, it misstates the Second Circuit's decision in this case. Petitioner first claims that the Second Circuit vacated the decision of the trial court based upon the cat's paw theory of liability; however, this the Second Circuit did not do. There is no mention of the cat's paw theory of liability in the Second Circuit's decision, and its holding cannot even be read as an endorsement of it. The Second Circuit here held only that a jury may find retaliation "so long as the jury concludes that an agent is acting explicitly or implicitly *upon the orders of a superior*." App. 24a (internal citation and quotation omitted) (emphasis added). The Second Circuit did not consider at all the situation in *Staub*, where a non-discriminatory supervisor acts upon the reports of a discriminatory subordinate. The Second Circuit went on to find that Respondent had produced sufficient evidence for a jury to conclude that Espejo and Katz were acting upon the orders (or the encouragement) of Rose and Vitanza. App. 25a.

Petitioner here seizes upon the Second Circuit's use of the word "encouragement," arguing that it is this word that suggests the Second Circuit employed the Seventh Circuit's cat's paw theory of liability. Petition at 10-11. First, as set forth above, the Second Circuit found there was sufficient evidence for a jury to conclude that Espejo and Katz were acting upon the orders of Rose and Vitanza, not simply their encouragement. Moreover, this is where the second

factual distinction between this case and *Staub* comes into play, because even if Rose or Vitanza only encouraged Espejo's and Katz's behavior, Espejo specifically testified that he engaged in no independent review of Respondent's performance like the non-discriminatory decision-maker did in *Staub*. Because Espejo engaged in no such review, he was a "decision maker" in name only. *See Staub*, 560 F.3d at 656 ("We were, and remain to this day, unprepared to find an employer liable based on a nondecisionmaker's animus *unless the 'decisionmaker' herself held that title only nominally*.") (emphasis added). This language in *Staub* is evidence that the Seventh Circuit would have considered the case differently had it been presented with the situation before the Court here – namely,
a discriminatory supervisor who directs a non-discriminatory subordinate to take adverse employment action in name only.

The final distinction between this case and *Staub* is that this is a retaliation case while *Staub* is a case based upon discrimination. This distinction is important because, as the Second Circuit pointed out here, it has long been held that a retaliation plaintiff may show a causal connection between her complaints of discrimination and adverse employment actions merely by showing that her complaint was followed closely in time by the adverse actions about which she complains, *even if* the decision-maker denies knowledge of the complaint of discrimination.

This distinction is significant because in a discrimination claim such as in *Staub* there is no triggering event after which the discrimination occurs such that it can circumstantially be said that the discrimination was caused by the event. In a retaliation case, however, there is such an event, and the temporal proximity between the event and the retaliation is a method of proving the requisite causal connection even absent proof of direct retaliatory intent. Thus, even if this Court's decision in *Staub* has some tangential effect on Respondent's claims here, Respondent nevertheless would have the opportunity to prove his case through temporal proximity alone had the jury been instructed properly by the trial court. Accordingly, for this additional reason, Petitioner's writ and requested order to remand must be denied.

CONCLUSION

The petition for writ of certiorari should be denied. Respondent requests attorney's fees and costs on appeal in connection with his claim under Title VII of The Civil Rights Act of 1964. Respondent also requests attorney's fees and costs, including double costs, for Petitioner's filing of a frivolous petition under Supreme Court Rules 42(2) and 43(7).

Respectfully submitted,

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